



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: CA & R 30/2019
Heard on: 30/11/2020
Delivered on: 15/01/2021

In the matter between:

DESMOND APPIE

Appellant

and

THE STATE

Respondent

Quorum: Mamosebo J et Mofokeng AJ

JUDGMENT ON APPEAL

MAMOSEBO J

- [1] The appellant was convicted by Regional Court Magistrate Z Mbalo in Kimberley on 11 counts of fraud and 10 of the

contravention of s 4 of the Prevention of Organised Crime Act, 121 of 1998 (POCA) notwithstanding his plea of not guilty. All counts were taken together for purposes of sentence and he was sentenced to ten (10) years imprisonment, three (3) years of which were suspended for a period of five years on certain conditions.

- [2] The appeal serves before us with leave of this Court (Olivier J et Chwaro AJ) limited in these terms:

"The petitioner is granted leave to appeal:

- 2.1 *Against his conviction on counts 11 to 20, only on the ground advanced in his petition, viz that the convictions amount to a duplication of those [in] counts 1 to 10; and, in the event that the appeal against those convictions should succeed;*
- 2.2 *Against his sentence, only on the ground that it was imposed in respect of all convictions taken together."*

- [3] In essence the grievance of the appellant is captured in these submissions by his counsel, Mr Pieterse:

3.1 That the Regional Magistrate misdirected herself in finding that the State proved all the elements of the offence of money laundering in respect of Counts 11 to 20 by merely relying on the same facts found to be proven in respects of Counts 1 to 10 for fraud;

3.2 Invoking the authority in *De Vries and Others v The State*¹ counsel contended that if the source of the money that the appellant used was legal then the property derived from that source is concomitantly legal. Differently put, there was

¹ 2012 (1) SACR 186 (SCA)

nothing to be washed or laundered because the money was legal or clean. What the appellant disguised was the destiny of the money, hence the misdirection on this aspect by the magistrate; the argument went.

- [4] The background facts to this case are mainly common cause. The State called 15 witnesses and also relied on documentary evidence to make out its case. The appellant was formerly an attorney who was struck off the roll of attorneys by the Northern Cape Division of the High Court on the application of the Law Society of the Cape of Good Hope on 25 November 2011 but had continued to practice notwithstanding.
- [5] In counts 1 to 10 he was charged with fraud read with section 103 of the Criminal Procedure Act, 51 of 1977, alternatively theft. The State alleged that he sold houses to state witnesses at specified amounts as an agent. He furnished the witnesses with his ABSA bank account into which deposits were made. Each witness was shown a house which they inspected before making payment into the appellant's personal bank account. He gave an undertaking regarding occupation and transfer of the houses in their names upon registration.
- [6] The witnesses paid the money in cash to Mr Walter Mocumi and a female employee who issued them with receipts and also signed as witnesses on the Deed of Sale. The appellant's signature does not appear on the Deeds of Sale. As time passed by but no occupation was effected the witnesses, at different instances,

visited the appellant's office to enquire about the transfers. Mr Mogotsi, one of the buyers, was met with a padlock on the office door of the appellant. Upon advice he was able to recover his money from the Fidelity Fund. Not all witnesses were so lucky.

- [7] The second count related to money laundering in contravention of s 4 r/w sections 1, 8(1) of the Prevention of Organised Crime Act, 121 of 1998 (POCA). The State relied on the same facts and witnesses to prove Count 2. The trial court made the following remarks² in part of its finding:

"But now coming to the aspect of the agreement between Thelma and the accused person I find it hard to believe that the accused, being an attorney, would enter into any sort of an agreement without checking its legitimacy. The accused's failure to lay charges against Thelma, whom he says defrauded him and dragged his good name into the mud, points towards collusion between the two. The accused wanted to protect Thelma as they were working together. They were interested in the high interest rates. The explanation given by the accused that he waited for his day in court does not make any sense. More so that the accused is an attorney."

- [8] Both counsel invoked *S v Dlamini*³ for the test applied in considering the issue of duplication of convictions where it is stated:

"[19] Our Courts have applied different tests to decide whether duplication has occurred. In S v Maneli Stricher JA explained:

'One such test is to ask whether two or more acts were done with single intent and constitute one continuous transaction. Another is to ask whether the evidence necessary to establish one crime involves proving another crime.

- [20] There is, however, no all-embracing formula. The various tests are more guidelines they are not rules of law, nor are they exhaustive. Their applicability may yield a clear result, but, if not, a court must apply*

² Record Volume 10 page 782 lines 20 to page 783 line 3

³ 2012 (2) SACR 1 (SCA) at paras 19 and 20

its common sense, wisdom, experience and sense of fairness to make this determination.”

- [9] Mr Pieterse further submitted that the appellant did not conceal the fact that he received the money from all the witnesses; that there is no evidence that he denied same; that the way in which the appellant disposed of the money is irrelevant; that what is relevant is whether the money that he received was illegal or tainted and had to be washed before going back into the economy which, he contended, was not the case.
- [10] The State had alleged in the charge sheet that the agreement between the appellant and the complainants had the effect of concealing or disguising the money trail. Mr Pieterse submitted that the allegation cannot be true as the State was able to trace all the payments and detailed them in Schedule A to the charge sheet.
- [11] Mr Els, for the State, emphasised that the appellant received cash deposits into his personal bank account as opposed to trust account through which he had to account to his clients. The appellant subsequently withdrew the deposits and paid the money over to Thelma based on a scheme they devised.
- [12] In *S v Dos Santos and Another*⁴ where Ponnar JA pronounced:

“[43] Prosecutions under POCA, as also predicate offences, would usually involve considerable overlap in the evidence, especially where the enterprise exists as a consequence of persons associating and committing acts making up a pattern

⁴ 2010 (2) SACR 382 (SCA) at para 43

of racketeering. Such overlap does not in and of itself occasion an automatic invocation of an improper splitting of charges or duplication of convictions.”

- [13] The learned Judge of Appeal also made the following concluding remarks in *Dos Santos*⁵:

*“Our legislature has chosen to make commission of two or more crimes within a specified period of time, and within the course of a particular type of enterprise, independent criminal offences. Here the two statutory offences are distinctly different. **Since POCA substantive offences are not the same as the predicate offences, the State is at liberty to prosecute them in separate trials or in the same trial. It follows as well that there could be no bar to consecutive sentences being imposed for the two different and distinct crimes, as the one requires proof of a fact, which the other does not.** Although a court in the exercise of its general sentencing discretion may, with a view to ameliorating any undue harshness, order the sentences to run concurrently.”* (Own emphasis)

- [14] The following remarks in *De Vries and Others v The State*⁶ bear some significance:

“[56] By receiving the cigarettes for himself well knowing they were stolen, the appellant made himself guilty of theft as it is a continuing crime. By proceeding to use the cigarettes as part of his stock in trade as a wholesaler as if they were goods lawfully acquired, and thereby disguising or concealing the source, movement and ownership of the cigarettes and enabling and assisting the robbers to either avoid prosecution or to remove property acquired in the robberies, the appellant clearly made himself guilty of a contravention of s 4. Doing so involved different actions and a different criminal intent to that required for theft. In these circumstances there was no improper splitting of charges.” See also *Horn v S*⁷.

- [15] Now turning more specifically to the factual matrix to establish whether or not the Magistrate has misdirected herself:

⁵ At para 45

⁶ 2012 (1) SACR 186 (SCA)

⁷ 2020 (2) SACR 280 (ECG) at para 54

- 15.1 The appellant has already been found guilty of fraud in counts 1 – 10 and has not appealed against the convictions. His conduct involved a misrepresentation pertaining to payments made to him by the witnesses. The money was paid specifically for the purchase of their homes.
- 15.2 For purposes of POCA, it is necessary to also point out that the manner in which the appellant arranged to receive the money either in cash or payable into his personal bank account while knowing that he was stripped off his attorney profession, is a clear manifestation of his criminal intent;
- 15.3 It is clear from the record that the appellant's intention was not to have the ownership of the property pass to the witnesses as undertaken. This forms the basis for the offence of money laundering;
- 15.4 The element of disguise features when the appellant either received the money in cash or withdrew all the deposited amounts and overtly paid the money over to Thelma as per their (his and Thelma's) scheme. This action, in my view, clearly conceals the origin of the money, its location, disposition and movement.
- 15.5 Astonishingly, the appellant did not call Thelma as his witness during trial and did not lay any charges against her or report her to the authorities for failing to reimburse the money on demand. This failure can only serve to confirm a

collusion or agreement between them. These findings were correctly made by the Magistrate.

15.6 It cannot be correct to maintain that the money received was legal as argued by Mr Pieterse since the money was proceeds of a crime of fraud for which the appellant was convicted. It remains unclear and inexplicable why the money had to be in cash whereas there was the facility of an electronic transfer from the appellant's bank account to Thelma's which was not utilised for nefarious reasons.

[16] In the premises there was no misdirection by the Magistrate in her finding that the appellant was also guilty of money laundering. He clearly disguised or concealed the money that was not his, which he received fraudulently, to hide its movement by appropriating the cash payments to avoid prosecution while simultaneously gaining higher interest in Thelma's account. This action amounts to a contravention of s 4 of POCA. The State was therefore entitled to prosecute both offences under a single prosecution which did not constitute an irregular splitting of charges.

[17] With regard to sentence: It is trite that sentencing is within the discretion of the trial court and a court of appeal will only interfere if there is a clear misdirection on the part of the trial court, or the sentence is shockingly severe. See *Haarhoff and Another v Director of Public Prosecutions, Eastern Cape*⁸.

⁸ 2019 (1) SACR 371 (SCA)

[18] The SCA made the following instructive remarks in *S v Pillay*⁹:

“[M]ere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court’s decision on sentence.”

[19] The appellant was only granted leave against his sentence on condition that his appeal against the conviction on money laundering would stand. The decision was based on the fact that all counts were taken as one for purposes of sentence. This Court is *strictu sensu*, in any event, not competent to venture beyond the contours circumscribed in the petition. Imposing a globular sentence is not *per se* incompetent. Bosielo JA, writing for a unanimous court in *S v Rantlai*¹⁰ pronounced:

“[9] It is widely accepted that there is no law which prohibits or provides for the imposition of a globular sentence. See S v Young 1977 (1) SA 602 (A) at 610E. The imposition of a globular sentence depends upon the discretion of the sentencing officer, based on the peculiar facts of the case. However, our courts have on various occasions expressed some misgivings about such sentences, particularly where an accused was convicted after having pleaded not guilty, but subsequently having the conviction on some counts set aside on appeal. See Director of Public Prosecutions, Transvaal v Phillips 2013 (1) SACR 107 (SCA) ([2011] ZASCA 192) para 27 where Petse AJA stated:

‘The practice of imposing globular sentences for multiple counts is generally an undesirable one.’

See also S v Kruger 2012 (1) SACR 369 (SCA) ([2011] ZASCA 219 para 10.”

⁹ 1977 (4) SA 531 (A) at 535

¹⁰ 2018 (1) SACR 1 (SCA) at (para 9)

[20] On a conspectus of the above, the appeal against the appellant's conviction on money laundering and the sentence is dismissed.


PP. MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

I agree


A MOFOKENG
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the appellant:

Adv RJ Pieterse

For the respondent:

Adv. WJ Els

Instructed by:

The office of the DPP